* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA No.107 of 2007**

% Judgment reserved on: 29th January, 2007

Judgment delivered on: 15th February, 2007

COMMISSIONER OF INCOME TAX-V
CENTRAL REVENUE BUILDING
NEW DELHI .... Appellant

Through:Mr.Sanjeev Sabharwal, Adv.

versus

NU-CORK PRODUCTS PVT. LTD.
C/O M/S B.B.GARG & CO
12-A, DEWAN HALL,
BHAGIRATH PALACE
DELHI-110006 .... Respondent

Through:None

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE V.B. GUPTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to Reporter or not? No

3. Whether the judgment should be reported in the Digest? No

V.B. GUPTA, J.

Present appeal has been filed by the Revenue against the impugned order dated 26th May, 2006 passed by

Income Tax Appellate Tribunal (in short 'Tribunal').

2. Brief facts of the case are that Assessee has been engaged in manufacturing of rubberised cork sheets since 2nd January, 1992. For assessment year 2001-02, in respect of its profit from industrial concern, the deduction was claimed under Section 80-IA @30% of its profit. The Assessing Officer declined the Assessee's claim holding that the items manufactured by the Assessee comes under Eleventh Schedule at Sl.No.27 & 28, and these items are of packaging and fittings. The contention of the Assessee that the Department has allowed deduction in respect of the same very product in assessment year 1998-1999 was declined on the plea that every assessment year is a separate assessment year, therefore, the contention of Assessee was not found acceptable.

3. The Commissioner of Income Tax(A) confirmed the order of Assessing Officer by observing that the Assessee is a small scale industrial undertaking which has started manufacturing on 2nd January, 1992 which is much before than 1st April, 1995 as mentioned in Sub-section 3(ii) of Section 80-IB. The plea of the Assessee that it is also

covered under sub-section 3(i) has got no force and merit because clause 3(i) is for the industrial undertakings which are not small scale industrial undertakings.

4. The Tribunal vide its impugned order reversed the finding of Commissioner Income Tax(A) holding that the Assessee is entitled for deduction for ten years from the date of start of its production, which was 2nd January, 1992. The year under consideration is assessment year 2001-2002, which is very well within a period of 10 years from the first year from which the Assessee is entitled for deduction under Section 80-IA. Tribunal further held that in the earlier assessment year, the Assessing Officer has allowed the deduction and during the year under consideration, there is no change in the facts and circumstances as the Assessee continued to manufacture the same very product. It was further held that though the principle of res judicata does not apply to the provisions of the Income Tax, but at the same time, it is equally true that unless there is a change of circumstance, the authorities will not depart from the previous decisions at their sweet will in the absence of material circumstances or reasons

for such departure. Thus, the rule of consistency which applies to the Income Tax proceedings has to be followed.

5. Being dissatisfied with the order of the Tribunal, the present appeal has been filed by the Revenue on the grounds that the Assessee is not entitled to benefit under Section 80-IA of the Act since the Assessee is engaged in the production of articles/goods mentioned in the negative list/Eleventh Schedule of serial No.27 & 28 and the benefit of deduction is allowed to small scale units only when they begin to manufacture goods during the period for which the benefit is available and as the Assessee started manufacturing the said goods only from 2nd January, 1992, i.e., before benefit was allowable to such small scale units, hence the case of Assessee does not fall within the proviso to the exclusion clause contained to Section 80-IA of the Act and plea of consistency is not applicable, as each year is distinct and separate and Assessing Officer is required to determine whether benefit or deduction is available for each year.

6. The Assessing Officer has disallowed the deduction

claimed under Section 80IA of the Act on the ground that the Assessee is a manufacturer of rubberized cork sheet and rubber product. So it is covered in the list of things specified in the list of Eleventh Schedule as mentioned at Sl.No.27 & 28 therein.

7. Whereas, Commissioner Income Tax(A) in its order dated 21st July, 2003 held that, the Appellant's case is not covered under the provisions of sub-section 3(ii) of Section 80IB because it has started production before 1st day of April, 1995.

8. On the other hand, the Tribunal vide impugned order held that :-

> "In view of the proviso to clause (iii) of Section 80-IA, we do not find any justification in the action of the AO for declining deduction, insofar as there is no dispute to the fact that the Assessee was a small scale industrial undertaking and a finding to this effect has also been recorded by the lower authorities and a relevant certificate was also filed before the AO during the course of assessment proceedings on 5.2.03. The objection of the CIT(A) for confirming the disallowance was that the Assessee is not covered by Section 80-IB since it started production much prior to the

> provisions of Section 80-IB having come into force. In this case the Assessee is entitled for deduction for ten years from the date of start of its production, which was 2.1.92. The year under consideration is AY 2001-02, which is very well within the period of 10 years from the first year from which the Assessee is entitled for deduction u/s 80-IA. We are, therefore, inclined to reverse the finding and conclusion of the lower authorities for allowing deduction to the Assessee u/s 80-IA, notwithstanding the fact that product manufactured by the Assessee was coming under Eleventh Schedule.

9. By virtue of the Finance Act, 1992, amendment has been made in Section 80-IA of the Act and these amendments have taken effect from 1st April, 1993 and accordingly, shall apply in relation to assessment year 1993-94 and subsequent years. Thus Section 80-IA is not applicable to assessment year 2001-02 for which the present appeal has been filed.

10. The present case falls under Section 80-I of the Act and the relevant portion of this Section reads as under:-

> "**S.80-I. Deduction in respect of profits and gains from industrial undertakings after a certain date, etc.-**(1) Where the gross total income of an assessee includes any profits and gains derived from an industrial

undertaking or a ship or the business of a hotel (or the business of repairs to ocean-going vessels or other powered craft) to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee, a deduction from such profits and gains of an amount equal to twenty per cent. thereof:

Provided that in the case of an assessee, being a company, the provisions of this sub-section (shall have effect in relation to profits and gains derived from an industrial undertaking or a ship or the business of a hotel) as if for the words “twenty per cent.”, the words “twenty-five per cent.” had been substituted.

(1A).....

(2) This section applies to any industrial undertaking which fulfills all the following conditions namely:-

(i)it is not formed by the splitting up, or the reconstruction, of a business already in existence;

(ii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose;

(iii) it manufactures or produces any article or thing, not being any article or thing specified in the list in the Eleventh Schedule, or operates one or more cold storage plant or plants, in any part of India, and begins to manufacture or

produce articles or things or to operate such plant or plants, at any time within the period of (fourteen years) next following the 31st day of March, 1981, or such further period as the Central Government may, by notification in the Official Gazette, specify with reference to any particular industrial undertaking;

(iv) in a case where the industrial undertaking manufactures or produces articles or things, the undertaking employs ten or more workers in a manufacturing process carried on with the aid of power, or employs twenty or more workers in a manufacturing process carried on without the aid of power:

Provided that the condition in clause (i) shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section:

Provided further that the condition in clause (iii) shall, in relation to a small-scale industrial undertaking, apply as if the words “not being any article or thing specified in the list in the Eleventh Schedule” had been omitted.

Explanation 1: ……."

11. Since, Assessee was a small scale industrial undertaking and started its production on 2nd January, 1992, so the Assessee is entitled for deduction for the assessment year 2001-02.

12. In the result, since no substantial question of law arises, the present appeal is hereby dismissed.

(V. B. GUPTA)
JUDGE

February 15, 2007
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(MADAN B. LOKUR)
JUDGE